Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1999

Joseph Charles Pelchat,

Petitioner,

v.

United States of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, for a person sentenced prior to the enactment of 18 U.S.C. §3583(h) and upon revocation of a term of supervised release, an additional period of incarceration may be followed by a subsequent term of supervised release.

PARTIES TO THE PROCEEDING

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CITATIONS OF OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit filed on March 12, 1999, was unpublished.

BASIS FOR JURISDICTION IN SUPREME COURT

On March 12, 1999, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the District of Minnesota in the matter of United States v. Joseph Charles Pelchat. In the same judgment, the Petitioner's motion for hearing *en banc* was denied. Due to the concurrent denial, no motions for rehearing were filed.

Jurisdiction is conferred on this Court by 28 U.S.C.A. §1254(1), which allows a court of appeals case to be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any criminal case before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. §3583(e):

> "Modification of conditions or revocation.-- The court may . . .
> (1) terminate a term of supervised release and discharge the defendant . . .
> (2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, . . .
> (3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of

supervised release authorized by statute for the offense that resulted in such term of supervised release . . ., or

(4) order the defendant to remain at his place of residence during nonworking hours . . ."

Art. I, §10(1) of the United States Constitution:

"No State shall. . . pass any . . . ex post facto law . . ."

Art. I, §9(3) of the United States Constitution:

"No . . . ex post fact Law shall be passed."

Amendment V to the United States Constitution:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Federal jurisdiction existed in the District Court for the District of Minnesota, because the Petitioner had been charged with and convicted of Possession with Intent to Distribute Marijuana, in violation of federal law. Jurisdiction of the Court of Appeals for the Eighth Circuit was based on 28 U.S.C. §1291, which provides for jurisdiction over a final judgment from a U.S. District Court. This Court, therefore, has jurisdiction through 28 U.S.C. §1254, which allows cases in the courts of appeals to be reviewed by the Supreme Court by writ of certiorari.

In the district court, the Petitioner's supervised release was revoked and he was sentenced to 14 months imprisonment, to be followed by 22 months of supervised release. Because the Petitioner was originally sentenced prior to the enactment of 18 U.S.C. §3583(h), he appealed to the Eighth Circuit requesting relief from the additional term of supervised release which, although specifically authorized in 18 U.S.C. §3583(h), was not authorized by the controlling statute at the time of his original sentence, 18 U.S.C. §3583(e). In affirming the district court decision, the Eighth Circuit relied on its previous decision in United States v. Schrader, 973 F.2d 623 (8th Cir. 1992).

The Schrader decision interprets the language of 18 U.S.C. §3583(e) to allow imposition of an additional term of supervised release. Every court of appeal, except the First Circuit, has decided the identical issue to the contrary, holding specifically that the wording of 18 U.S.C. §3583(e) prohibits such an interpretation. Some of these decisions have held that they would like to be able to apply the law the way the Eighth Circuit does but are constrained from doing so by the rules of statutory construction.

Representative cases of those circuits which have decided the issue contrary to the Eighth Circuit include: United States v.

Koehler, 973 F.2d 132 (2nd Cir. 1992); Fowler v. US Parole Com'n, 94 F.3d 835 (3rd Cir. 1996); United States v. Cooper, 962 F.2d 339 (4th Cir.1992); United States v. Holmes, 954 F.2d 270 (5th Cir. 1992); United States v. Truss, 4 F.3d 437 (6th Cir. 1993); United States v. McGee, 981 F.2d 271 (7th Cir. 1992); United States v. Behnezhad, 907 F.2d 896 (9th Cir.1990); United States v. Rockwell, 984 F.2d 1112 (10th Cir. 1993); United States v. Williams, 2 F.3d 363 (11th Cir.1993).

Additionally, the Third, Fourth, Ninth, and Seventh circuits have held that an imposition of supervised release under 18 U.S.C. §2583(e) violates the ex post facto and/or due process clauses of the United States Constitution. United States v. Dozier, 119 F.3d 239 (3rd Cir. 1997); United States v. Lominac, 144 F.3d 308 (4th Cir.1998); United States v. Beals, 87 F.3d 854 (7th Cir.1996); United States v. Collins, 118 F.3d 1394 (9th Cir.1997).

In addition to the Eighth Circuit's failure to recognize that every circuit which has addressed the issue has decided opposite to itself, except for the First Circuit, the court refused to put the question to an *en banc* panel to determine whether the holding in Schrader was incorrect. The Eighth Circuit's current unwillingness to either conform to the majority of circuits or even re-evaluate its earlier decision is demonstrated by the fact that such a complicated issue warranted in this case only a three paragraph decision from the court.

Because the issue involves interpretation of a federal statute and the denial of constitutional protections, and because those under the jurisdiction of the Eighth and First circuits are currently receiving disparate treatment as compared to the rest of the country, this issue should be addressed by the Supreme Court for a final and authoritative decision on the issue.

REASONS FOR ALLOWANCE OF WRIT

This writ should be allowed because a multitude of United States courts of appeal have entered decisions in conflict with the decision of the Eighth Circuit on the same important federal question. The issue upon which the Eighth Circuit fails to agree with the majority of circuits deals with interpretation of a federal statute, which results in disparate treatment of those under the jurisdiction of the Eighth and First Circuits.

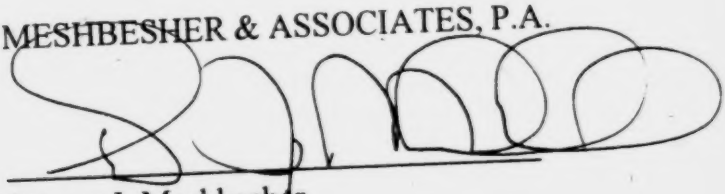
Specifically, the Eighth and First Circuit decisions regarding the effect of 18 U.S.C. §3583(e) are opposite to the decisions of every other circuit court which has decided the issue.

CONCLUSION

Review by the U.S. Supreme Court is necessary because of the differing opinions between the Eighth and First Circuits and all the other federal circuit courts of appeal. Therefore, the Petitioner requests that a Petition for Certiorari be granted to review this important federal question.

Respectfully submitted,

MESHBESHER & ASSOCIATES, P.A.



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APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-3723

Joseph Charles Pelchat,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
United States of America,	*	
	*	[UNPUBLISHED]
Appellee.	*	

Submitted: March 9, 1999
Filed: March 12, 1999

Before RICHARD S. ARNOLD, WOLLMAN, and BEAM, Circuit Judges.

PER CURIAM.

In October 1998, while Joseph Charles Pelchat was serving

a four-year supervised release term, the district court[1] determined that he had violated his release conditions, revoked his release, and sentenced him to 14 months imprisonment and 22 additional months of supervised release. Pelchat appeals, arguing the district court erred in imposing additional supervised release after revocation and imposition of a prison term. We affirm.

Pelchat first mounts an attack on our decision in United States v. Schrader, 973 F.2d 623, 625 (8th Cir. 1992) (under 18 U.S.C. § 3583(e)(3), district court may impose revocation sentence consisting of both imprisonment and supervised release). Not only have we repeatedly declined to reconsider Schrader en banc, see, e.g., United States v. Hartman, 57 F.3d 670, 671 (8th Cir. 1995) (per curiam), but we specifically denied Pelchat's motion for en banc consideration of this appeal.

Pelchat next raises constitutional challenges to his revocation sentence. He argues that he could not have foreseen, at the time he was originally sentenced, that his conduct while on supervised release could subject him to both imprisonment and further supervised release, in violation of his due process rights. He also contends that applying 18 U.S.C. § 3583(h) (specifically authorizing imprisonment and supervised release upon revocation) to him violates the Ex Post Facto Clause, as subsection (h) was not in existence when he was originally sentenced. However, we have previously considered and rejected such arguments. See United States v. St. John, 92 F.3d 761, 763-67 (8th Cir. 1996).

Accordingly, we affirm.

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[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota.

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